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Yap Kiam Lin v Azman bin Abdullah & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12BNCvC-198–11 OF 2014
YEOH WEE SIAM J
2 OCTOBER 2015

C *Tort — Road accident — Quantum and liability — Appeal against decision of sessions court judge — Collision between motorcycle and motorvan — Apportionment of liability — Whether van driver 100% liable — Reduction of quantum — Deceased's monthly nett salary after deductions for EPF, SOCSO — Whether probable for deceased to comfortably give financial*
D *support to parents*

This was an appeal by the appellant ('the defendant') in respect of the decision of the sessions court judge ('trial judge') who decided that the defendant was 100% liable for the motor vehicle accident which caused the death of the
E respondents' ('the plaintiffs') son ('the deceased'). The deceased was riding his motorcycle from the direction of Besraya Highway towards Kuala Lumpur. The defendant, who was driving a van without giving any signals, suddenly came out from the junction at the deceased's left, and crossed and obstructed the deceased's path and caused a collision with the deceased's motorcycle. Due
F to injuries sustained in the accident, the deceased passed away on the same day. The defendant denied the plaintiffs' allegation that he caused the accident and pleaded that the accident was caused wholly or partly by the deceased's negligence. The trial judge awarded the plaintiffs quantum of RM600 per month for 16 years. The trial judge awarded a quantum for contribution based
G on 100% liability of the in the sum of RM115,200 (RM600 per month x 12 months x 16 years). This appeal concerned both the liability and quantum.

Held, allowing the appeal:

H (1) The trial judge had erred in fact and in law in her decision. The decision of the trial judge on liability was reversed and substituted with a new order to hold the defendant and the deceased to be each 50% liable for the accident. Instead of RM600 per month, the trial judge's order was substituted with a figure of RM500 per month (RM500 per month x 12
I months x 16 years = RM96,000). Based on 50% liability, the contribution shall be RM48,000 (50% x RM96,000) (see paras 11–14).

(2) The reason for the reduction from RM600 to RM500 per month was due to the failure of the trial judge to appreciate that on an average, the deceased's monthly nett salary, after deductions for EPF, SOCSO and

advance/loan, was about RM1,031.30–RM1,281. Bearing in mind the high cost of city living, it was highly improbable that the deceased would have been able to comfortably give financial support of RM600 per month to his parents, let alone the high amount of RM700–RM800 per month as alleged by the plaintiffs to have been given to them by the deceased. Even though the deceased was living with his parents, and using his father's motorcycle and bringing food from home, it was more probable that the deceased could have afforded a steady contribution of about RM500 per month for the support of his parents/the plaintiffs (see para 15).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') berkaitan keputusan hakim mahkamah sesyen ('hakim bicara') yang memutuskan bahawa defendan adalah bertanggungan 100% untuk kemalangan kenderaan yang menyebabkan kematian anak lelaki ('si mati') responden-responden ('plaintif-plaintif'). Si mati menunggang motosikalnya dari arah Jalanraya Besraya ke arah Kuala Lumpur. Defendan, yang memandu van tanpa memberikan apa-apa isyarat, tiba-tiba keluar daripada simpang di sebelah kiri si mati, dan melintas dan menghalang jalan si mati dan menyebabkan perlanggaran dengan motosikal si mati. Akibat kecederaan yang dialami, si mati meninggal dunia pada hari yang sama. Defendan menafikan dakwaan plaintif-plaintif bahawa dia yang menyebabkan kemalangan dan merayu bahawa kemalangan disebabkan sepenuhnya atau sebahagian oleh kecuaian si mati. Hakim bicara mengawaradkan plaintif-plaintif kuantum sebanyak RM600 sebulan untuk 16 tahun. Hakim bicara mengawardkan kuantum untuk sumbangan berdasarkan liabiliti 100% dalam jumlah sebanyak RM115,200 (RM600 sebulan x 12 bulan x 16 tahun). Rayuan ini adalah berkenaan kedua-dua liabiliti dan kuantum.

Diputuskan, membenarkan rayuan:

(1) Hakim bicara telah tersilap dari segi fakta dan undang-undang dalam keputusannya. Keputusan hakim bicara atas liabiliti diakas dan diganti dengan perintah baru untuk memutuskan defendan dan si mati kedua-duanya bertanggungan 50% untuk kemalangan. Daripada RM600 sebulan, perintah hakim bicara diganti dengan jumlah sebanyak RM500 sebulan (RM500 sebulan x 12 bulan x 16 tahun = RM96,000). Berdasarkan 50% liabiliti, sumbangan akan menjadi sebanyak RM48,000 (50% x RM96,000) (lihat perenggan 11–14).

(2) Alasan untuk pengurangan daripada RM600 kepada RM500 sebulan akibat kegagalan hakim bicara untuk menilainya atas purata, gaji bersih bulanan si mati, selepas pengurangan untuk KWSP, SOCSO dan pinjaman, adalah lebih kurang RM1,031.30–RM1,281. Mengambil kira kos tinggi sara hidup di bandar, ia adalah tidak berkemungkinan

bahawa si mati akan mampu dengan selesa memberi bantuan kewangan sebanyak RM600 sebulan kepada ibu bapanya, apatah lagi jumlah tinggi sebanyak RM700–RM800 sebulan seperti yang didakwa oleh plaintif-plaintif diberikan kepada mereka oleh si mati. Walaupun si mati tinggal dengan ibubapanya, dan mengguna motosikal bapanya dan membawa makanan daripada rumah, ia adalah lebih mungkin yang si mati mampu memberi sumbangan tetap lebih kurang RM500 sebulan untuk membantu kedua-dua ibu bapanya/plaintif-plaintif (lihat perenggan 15).]

Notes

For cases on road accident in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2294–2298.

Legislation referred to

Evidence Act 1950 s 114(g)

Freddy Lim (KH Kung with him) (KG Chan, Freddy Lim & Co) for the appellant. Sri Kumar (The Chambers of Sri) for the respondents.

Yeoh Wee Siam J:

ENCLOSURE 1

[1] This is the appeal of the appellant/defendant ('the defendant') in respect of the decision of the learned sessions court judge ('trial judge' or 'sessions court') which decided as follows:

(a) that the defendant is 100% liable for the motor vehicle accident which caused the death of the son ('the deceased') of the respondents/plaintiffs ('the plaintiffs'); and

(b) on quantum: that the plaintiffs, as dependants of the deceased, be given a contribution of RM600 per month for 16 years.

[2] The defendant appealed to the High Court on both issues of liability and quantum.

BRIEF FACTS

[3] The plaintiffs are the deceased's parents. The civil suit was instituted by the plaintiffs to claim for loss of financial support/contribution given to them by the deceased ('contribution').

[4] On 23 July 2011, at about 10.50am, the deceased was riding his motorcycle No WSP 3465 from the direction of Besraya Highway towards the

city of Kuala Lumpur ('KL'). In the plaintiffs' writ of summons and statement of claim ('SOC'), the plaintiffs pleaded that the defendant, who was driving a motorvan No WCB3265 ('van'), without giving any signals, suddenly came out from the junction at the deceased's left, and crossed and obstructed the deceased's path and caused a collision with the deceased's motorcycle. Due to injuries sustained in the accident, the deceased passed away on the same day.

[5] In his defence, the defendant denied the plaintiffs' allegation that he caused the accident. He pleaded that the accident was caused wholly or partly by the deceased's negligence.

THE HIGH COURT'S DECISION GIVEN ON 24 JUNE 2015 ON ENCLOSURE 1

[6] After considering the appeal, I allowed the appeal of the defendant as follows:

(1) on liability: the decision of the sessions court is reversed and substituted with a liability of 50% for the defendant and 50% for the deceased;

(2) on quantum: the contribution to the plaintiffs is reduced from RM600 per month to RM500 per month for 16 years: RM500 per month x 12 months x 16 years = RM96,000; and

(3) costs are to be borne by the respective parties.

APPEAL TO THE COURT OF APPEAL

[7] The plaintiffs filed a notice of appeal on 23 September 2015 to appeal to the Court of Appeal against the whole of the decision of the High Court in respect of issues on liability and quantum.

GROUNDS FOR THE HIGH COURT'S DECISION

(1) On liability

[8] The trial judge found that there were two versions given to the court as to how the accident took place, namely:

(a) the plaintiffs' version: that the deceased was travelling on a straight road. The defendant's van came out of a junction infront and on the left of the deceased. Due to the suddenness and proximity of the emergence of the defendant's van, the deceased was unable to avoid the van, and collided into the rear of the van; and

(b) the defendant's version: the defendant denied that he emerged from a junction. He claimed that he was travelling on the main road at all times.

Because of the traffic, his speed was only around 30–40 kmph. At no point of time was he aware of the deceased's presence until the collision took place as he was looking infront whilst the deceased was coming from his rear.

[9] The trial judge was correct to rely on the evidence of the only eyewitness to the accident, namely PW3, and concluded that the plaintiffs' version is more probable. This means that the defendant did emerge from the side road at the junction and entered the main road infront of the deceased. The defendant's version cannot be accepted because nowhere in his defence did he plead that he was at all times travelling on the straight main road.

[10] However, the trial judge erred in fact and in law by not considering the following evidence of PW3 (RR pp 82–99):

(a) PW3 was travelling in his car at a speed of 40–50 kmph, behind the deceased who was riding his motorcycle at a speed of about 60 kmph on the main road. Given these two speeds, and considering the defendant's unrebutted evidence that the defendant was driving his van at a speed of 30–40 kmph, it is clear that the deceased was riding at a fast speed on the main road. Thus, even if the defendant had suddenly emerged from the side road at the junction on the left of the deceased, and entered the main road, since the deceased was behind the defendant's van, the deceased was negligent in not avoiding the defendant's van. If the deceased had seen the defendant's van infront of him, just as PW3 could see the defendant's van infront of the deceased from PW3's position behind the deceased, it only means that the deceased was riding too fast and too close to the rear of the defendant's van (see sketch plan at RR p 138: the defendant's van came out from Jalan Landai Permai onto the main road; PW3 was at Z; the accident was at X). Therefore, it is my view that the trial judge erred to hold that the defendant is 100% liable for the accident. In my opinion, the deceased had contributed to the accident through his negligence in not slowing down to avoid a collision with the defendant's van, and thus the liability should be 50% for the defendant and 50% for the deceased;

(b) PW testified that he saw the accident infront of him. However, the trial judge did not consider PW3's answers given in his cross-examination (RR pp 90–92):

Q: *... Bagaimana van itu kereta keluar dari simpang, bagaimana motor itu langgar, kamu lihat semua?*

A: *Tidak.*

Q: *Semasa kamu pandu kamu duduk terus ke atau tengok kiri?*

A: *Terus*;

Q:	Terus boleh lihat kemalangan itu?	A
A:	Saya nampak bila van itu keluar, kereta semua emergency break. Kereta depan semua emergency break.	
Mah:	Semua kereta emergency break. Adakah itu sebab van itu keluar?	
A:	Selepas pertembungan. Ada kereta di belakang van itu semua emergency break.	B
Q:	Adakah kamu boleh lihat semua kejadian?	
A:	Ya.	
Q:	*Awak boleh lihat van itu keluar dari simpang dan langgar?*	C
A:	*Saya buat kasar sahaja.* Actually rajah ini pun tidak betul sangat. I was before the lorong dia keluar. ;	
Q:	*Semasa kamu pandu kereta itu, berapakah kelajuan kereta kamu?*	D
A:	*40–50 KM/J.*	
Q:	*Semasa kamu memandu kereta itu kamu ada lihat kenderaan, berapakah kelajuan motorsikal itu?*	
A:	*60 KM/J. ;*	E
Q:	Di posisi Z kamu yang tandakan, motorsikal itu berada di lorong mana?	
A:	Lorong B ke C.	
Q:	Di belakang kamu atau di depan kamu?	F
A:	Di depan.	
Q:	*So secara bandingan dia lebih laju dari kamu?*	
A:	*Ya.*	
Q:	Kamu kata van itu keluar dari simpang, masuk dia punya lorong dan apa berlaku?	G
A:	Bila van itu keluar motorsikal itu langgar dibelakang.	
Q:	Masuk sahaja langgar?	
A:	Ya.	H
Q:	*Motorsikal itu ada break tak?*	
A:	*Tidak tahu.*	
Q:	*Tidak tahu atau tidak boleh ingat?*	I
A:	*Tidak tahu.* (Emphasis added.)	

From PW3's evidence, it can be concluded that PW3 was driving behind the motorcycle and the van. He was looking straight, and not left where

the van emerged from. PW3 confirmed that the deceased was speeding. Suddenly, all the vehicles infront of PW3 applied their emergency brakes due to the collision. So what PW3 was sure about was the fact that the collision took place infront of him.

However, PW3 did not exactly see at what point the van emerged from the side road and entered the main road, and who is at fault. He did not know if the deceased used his brakes. Therefore, the trial judge ought to have given the benefit of the doubt to the defendant, and not hold him 100% liable;

(c) the trial judge did not consider the fact that PW3 was not paying attention to the details of the accident. PW3 had admitted that he did not even know the numbers of the vehicles involved in the accident. For the purpose of his police report (RR p 136), PW3 had to get the vehicle numbers from his friend, Surin, who was then in his car. This means that PW3's evidence is not so accurate as to the details of the collision between the van and the motorcycle. Surin would be able to give better evidence than PW3 since Surin was not driving, and Surin paid attention to the details of the accident. However, according to PW3, Surin is now working in Singapore. The plaintiffs did not show to the sessions court their efforts in locating Surin to ensure his attendance in court as a witness.

Under s 114(g) of the Evidence Act 1950, the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who witholds it. The trial judge did not consider this. Therefore, here again, the benefit of the doubt in the plaintiffs not calling Surin as a witness, ought to be given to the defendant;

(d) the trial judge made the following finding from the defendant's evidence (DW1) (RRT pp 5–6):

> The defendant, DW1, had stated that he was travelling at a slow speed estimated at 30 to 40kph. When questioned on the damage to his van, the defendant, DW1, answered:
>
> > Setuju kerosakan van kemek di belakang. Lampu brek kanan pecah dan cermin belakang pecah. Kerosakan teruk.
>
> To my mind, it is most inherently improbable that the deceased could have without rhyme or reason rode his motorcycle at a high speed to knock into the defendant's van to cause such an extensive damage. On the other hand, I find PW3's description as to how the collision occurred to be a plausible and reasonable explanation for the damage to the van.
>
> As there was no evidence of contributory negligence on the part of the deceased, I held the defendant to be wholly liable in this accident.

In the light of the extensive damage caused to the defendant's van (see also photos at RR p 137), the trial judge failed to appreciate the fact that the deceased would probably have been travelling at a fast speed, and was too close behind the van, to have collided with such a strong impact into the whole rear, and right rear brake lights of the defendant's van. Thus, the trial judge erred to hold that there is no contributory negligence by the deceased; and

(d) The trial judge failed to appreciate the evidence of the investigating officer ('IO') (PW1) who confirmed that to date, there is no investigation result on the accident and the matter is still pending instructions from the deputy public prosecutor ('DPP'). It is true, as submitted by the plaintiffs, that the file is still alive and active. However, it must be noted that the accident took place on 23 July 2011. As on the date of the decision of the sessions court on 10 November 2014, ie more than three years after the accident, the defendant still has not been charged in court for any road traffic offence. Therefore, it is highly improbable that the defendant is 100% liable for the accident.

[11] For the above reasons, I therefore decided that the trial judge had erred in fact and in law in her decision. I reversed the decision of the trial judge on liability, and substituted it with a new order to hold the defendant and the deceased to be each 50% liable for the accident.

(2) On quantum

[12] The trial judge awarded a quantum for contribution based on 100% liability of the defendant as follows:

RM600 per month x 12 months x 16 years = RM115,200.

[13] The defendant submitted that contribution should be about RM500 to RM600 per month.

[14] Instead of RM600 per month, I substituted the trial judge's order with a figure of RM500 per month as follows:

RM500 per month x 12 months x 16 years = RM96,000.

Based on 50% liability, the contribution shall be:

50% x RM96,000 = RM48,000.

[15] The reason for the reduction from RM600 to RM500 per month is due to the failure of the trial judge to appreciate that on an average, the deceased's monthly nett salary, after deductions for EPF, SOCSO and advance/loan, was

about RM1,031.30–RM1,281 (see RR pp 142–144 where the deceased's nett salary was RM1,040.20 for May 2011; RM1,281 for June 2011 and RM1,031.30 for July 2011). Bearing in mind the high cost of city living, it is highly improbable that the deceased would have been able to comfortably give financial support of RM600 per month to his parents, let alone the high amount of RM700–RM800 per month as alleged by the plaintiffs to have been given to them by the deceased. Even though the deceased was living with his parents, and using his father's motorcycle and bringing food from home, in my opinion, it is more probable that the deceased could have afforded a steady contribution of about RM500 per month for the support of his parents/the plaintiffs.

[16] I therefore ordered accordingly.

Appeal allowed.

Reported by Afiq Mohamad Noor